

FY 2008 ECR Policy Report to OMB-CEQ DEPARTMENT OF THE ARMY

On November 28, 2005, the Director of the Office of Management and Budget (OMB), and the Chairman of the President's Council on Environmental Quality (CEQ) issued a policy memorandum on environmental conflict resolution (ECR).

The memorandum requires annual reporting by departments and agencies to OMB and CEQ on progress made each year. This joint policy statement directs agencies to increase the effective use and their institutional capacity for ECR and collaborative problem solving.

ECR is defined in Section 2 of the memorandum as:

“third-party assisted conflict resolution and collaborative problem solving in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. The term “ECR” encompasses a range of assisted negotiation processes and applications. These processes directly engage affected interests and agency decision makers in conflict resolution and collaborative problem solving. Multi-issue, multi-party environmental disputes or controversies often take place in high conflict and low trust settings, where the assistance of impartial facilitators or mediators can be instrumental to reaching agreement and resolution. Such disputes range broadly from administrative adjudicatory disputes, to civil judicial disputes, policy/rule disputes, intra- and interagency disputes, as well as disputes with non-federal persons/entities. ECR processes can be applied during a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicts between federal, state, local, tribal, public interest organizations, citizens groups and business and industry where a federal agency has ultimate responsibility for decision-making.

While ECR refers specifically to collaborative processes aided by third-party neutrals, there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations that federal agencies enter into with non-federal entities to manage and implement agency programs and activities. The Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving presented in Attachment A (of the OMB/CEQ ECR Policy Memo) and this policy apply generally to ECR and collaborative problem solving. This policy recognizes the importance and value of the appropriate use of all types of ADR and collaborative problem solving.”

The report format below is provided for the third year of reporting in accordance with this memo for activities in FY 2008.

The report deadline is January 15, 2009.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies can collect this data to the best of their abilities. The 2008 report, along with previous reports, will establish a useful baseline for your department or agency, and collect some information that can be aggregated across agencies. Departments should submit a single report that includes ECR information from the agencies and other entities within the department. The information in your report will become part of an analysis of all FY 2008 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of the analysis of FY 2006 and FY 2007 ECR reports will be available at www.ecr.gov.

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Name and Title/Position of person responding:	Carrie Greco, Litigation Attorney
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Date this report is being submitted:	December 17, 2008

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2008, including progress made since 2007. If no steps were taken, please indicate why not.

[Please refer to the mechanisms and strategies presented in Section 5 of the OMB-CEQ ECR Policy Memo, including but not restricted to any efforts to a) integrate ECR objectives into agency mission statements, Government Performance and Results Act goals, and strategic planning; b) assure that your agency's infrastructure supports ECR; c) invest in support or programs; and d) focus on accountable performance and achievement. You are encouraged to attach policy statements, plans and other relevant documents.]

Consistent with Army Policy, Environmental Law Division (ELD) personnel continue to incorporate Environmental Conflict Resolution (ECR) in its case management.

ELD personnel evaluated each assigned case to ensure the effective and appropriate use of ECR. ELD personnel coordinated with the Department of Justice (DOJ) on the ECR process. DOJ personnel contracted to fund the third party costs and draft and negotiate ECR agreements.

ELD personnel reviewed and provided comments to the proposed revised draft ADR Directive.

ELD management assigned staff and directed resources to support ECR and foster the development of expertise among ELD personnel.

ECR resources were readily available to ELD personnel. Funding for document reviews and travel to ECR sessions were made available.

The ECR representative for ELD attended the 2008 Negotiation and Appropriate Dispute Resolution course at the Air Force JAG School, Maxwell AFB, and prepared training slides on ADR and Ethics. ADR and Ethics training was provided to USALSA on 24 June 2008.

Section 2: Challenges

2. Indicate the extent to which each of the items below present challenges or barriers that your department/agency has encountered in advancing the appropriate and effective use of ECR.

	Extent of challenge/barrier			
	Major	Minor	Not a challenge/ barrier	N/A
	<i>Check <u>only one</u></i>			
a) Lack of staff expertise to participate in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b) Lack of staff availability to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e) Lack of travel costs for your own or other federal agency staff	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f) Lack of travel costs for non-federal parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
g) Reluctance of federal decision makers to support or participate	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
h) Reluctance of other federal agencies to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j) Contracting barriers/inefficiencies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
k) Lack of resources for staff capacity building	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
m) Lack of budget incentives	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
n) Lack of access to qualified mediators and facilitators	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
o) Perception of time and resource intensive nature of ECR	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
p) Uncertainty about whether to engage in ECR	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
r) Other(s) (please specify): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
s) No barriers (please explain): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2008 by completing the table below. [Please refer to the definition of ECR from the OMB-CEQ memo as presented on page one of this template. An ECR “case or project” is an instance of neutral third party involvement to assist parties in reaching agreement or resolving a dispute for a particular matter. In order not to double count processes, please select one category per case for decision making forums and for ECR applications.]

	Cases or projects in progress ¹	Completed Cases or projects ²	Total FY 2008 ECR Cases ³	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2008 ECR cases indicate how many your agency/department	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored ⁴	Participated in but did not sponsor ⁵
<i>Context for ECR Applications:</i>									
Policy development	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Planning	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Siting and construction	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Rulemaking	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
License and permit issuance	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Compliance and enforcement action	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Implementation/monitoring agreements	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Other (specify): CERCLA 3d-party sites	__6__	__2__	__8__	__0__	__0__	__8__	__0__	__0__	__8__
TOTAL	__6__	__2__	__8__	__0__	__0__	__8__	__0__	__0__	__8__
	(the sum should equal Total FY 2008 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2008 ECR Cases)				(the sum should equal Total FY 2008 ECR Cases)	

¹ A “case in progress” is an ECR case in which neutral third party involvement began prior to or during FY 2008 and did not end during FY 2008.

² A “completed case” means that neutral third party involvement in a particular matter ended during FY 2008. The end of neutral third party involvement does not necessarily mean that the parties have concluded their collaboration/negotiation/dispute resolution process, that all issues are resolved, or that agreement has been reached.

³ “Cases in progress” and “completed cases” add up to “Total FY2008 ECR Cases”.

⁴ Sponsored - to be a sponsor of an ECR case means that an agency is contributing financial or in-kind resources (e.g., a staff mediator's time) to provide the neutral third party's services for that case. More than one sponsor is possible for a given ECR case.

⁵ Participated, but did not sponsor - an agency did not provide resources for the neutral third party's services for a given ECR case, but was either a party to the case or participated in some other significant way (e.g., as a technical expert advising the parties).

4. Is your department/agency using ECR in any of the substantive priority areas (i.e., NEPA, Superfund, land use, etc.) you listed in your FY 2007 ECR Report? Please also list any additional priority areas identified by your department/agency during FY 2008, and indicate if ECR is being used in any of these areas.

List of priority areas identified in your department/agency FY 2007 ECR Report	Check if using ECR	Check if use has increased since FY 2007
Superfund Litigation	x	x
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
List of additional priority areas identified by your department/agency in FY 2008	Check if using ECR	
_____	<input type="checkbox"/>	

Please use an additional sheet if needed.

5. It is important to develop ways to demonstrate that ECR is effective and in order for ECR to propagate through the government, we need to be able to point to concrete benefits; consequently, we ask what other methods and measures are you developing in your department/agency to track the use and outcomes (performance and cost savings) of ECR as directed in Section 4 (b) of the ECR memo, which states: *Given possible savings in improved outcomes and reduced costs of administrative appeals and litigation, agency leadership should recognize and support needed upfront investments in collaborative processes and conflict resolution and demonstrate those savings and in performance and accountability measures to maintain a budget neutral environment* and Section 4 (g) which states: *Federal agencies should report at least every year to the Director of OMB and the Chairman of CEQ on their progress in the use of ECR and other collaborative problem solving approaches and on their progress in tracking cost savings and performance outcomes. Agencies are encouraged to work toward systematic collection of relevant information that can be useful in on-going information exchange across departments?* [You are encouraged to attach examples or additional data]

Cases utilizing ECR are noted on the ELD Case Database, along with a description of the type of ECR and the ultimate outcome. The ELD Case Database is not currently designed to input the monetary and time expenditures of ECR as opposed to the estimated costs of litigation. This can be implemented into the proposed new database.

Generally, the costs of ECR replace the costs of litigation and the total costs for each case depend on the specific processes used. The amount of savings incurred through ECR depend on the extent that ECR uses a less extensive process than the litigation track, i.e, a less intensive document exchange process, mediation sessions instead of court hearings, position papers instead of briefs. In the reported cases, the ECR procedures resulted in a fewer expenditures than estimated through the litigation track.

6. Describe other significant efforts your agency has taken in FY 2008 to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not fit within the Policy Memo's definition of ECR as presented on the first page of this template.

ELD and the supporting Environmental Law Specialists found that they tend to work directly with the regulators and stakeholders, utilizing technical experts to provide needed information, and amicably work toward resolution without the need to bring in a third party. Federal Facility Agreements, Consent Degrees and other negotiated documents are drafted to contain built in dispute resolution procedures that are used when necessary. Discussions through the chain of command or with OMB or other agency decision makers are viable options should the dispute go unresolved. Additional training is being provided, including the NEPA Practitioners Guide and other ECR resources to help ELD personnel to recognize when ECR can be a viable option.

Section 4: Demonstration of ECR Use and Value

- 7 Briefly describe your departments'/agency's most notable achievements or advances in using ECR in this past year.

ECR has eliminated the tight deadlines imposed by litigation schedules. The parties are freer to set reasonable timetables for document exchanges, deadlines for filing of position papers and schedules for ECR sessions. ECR schedules are more easily altered to meet the needs of the case.

A number of Superfund cases have successfully used ECR to refine the discussion on damages and to normalize parties' expectations concerning the value of the case and the likely outcome.

In one case that has been in mediation for years, the Army has finally settled its portion of liability with the parties. The parties are currently negotiating the terms of the settlement document.

The Army benefited from an ECR conducted by the private parties that resulted in a global settlement.

Two cases have utilized ECR, led by the DOJ counsel who negotiated the Mediation Agreement and represented the Army in the mediation sessions. The Army's role was to review the mediation papers and provide input in proposed agendas for mediation sessions.

The Army Environmental Law Specialists have not utilized ECR. Instead they utilize outreach programs that provide effective channels of communication with stakeholders and regulators. ECR provisions exist in Federal Facility Agreements and Installation Restoration Program Partnering Programs with EPA and State regulators, but formal provisions have not been invoked. Thus, the Environmental Specialists have had no need for ECR, but would consider it if needed.

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2008). Please limit the length to no more than 2 pages.

Name/Identification of Problem/Conflict
Overview of problem/conflict and timeline, including reference to the nature and timing of the third-party assistance
CERCLA litigation is very complex and time consuming for most judges, so early on in the litigation the judge agreed to send the case to mediation. The parties negotiated a mediation agreement and set up an agenda and protocol for the mediation. The mediation process involved a document exchange, submitting of mediation papers and then a mediation session. The process was not rigidly tied to time limitations, and progressed as necessary to ensure all parties' concerns were raised and parties had time to caucus and work toward resolution.
Summary of how the problem or conflict was addressed using ECR, including details of how the principles for engagement in ECR were used (See Appendix A of the Policy Memo, attached)
In this particular case, the parties worked through the issues with informed commitments, accountability and openness. Each party was allowed to voice the issues/points to be resolved. Position papers were comprised of positions that agency/party leaders and clients supported. During ECR, confidentiality agreements were supported during oral presentations and through caucusing, the parties worked toward a resolution.
Identify the key beneficial outcomes of this case, including references to likely alternative decision making forums and how the outcomes differed as a result of ECR
ECR can avoid formal discovery, hearings and judge imposed deadlines. Parties can systematically move through ECR in a less formal atmosphere, providing the parties more time to gather the information and to prepare for the ECR sessions. It eliminates many of the formalities of preparing for and conducting a trial on the merits, saving man hours in preparing briefs, and the expenses in traveling to the court house and court costs.
Reflections on the lessons learned from the use of ECR
The process works only if the parties are willing to work toward a resolution. This often involves compromising from an earlier position, which some parties are not willing to do if they perceive their position as one that will win in court. In assessing whether to enter into ECR, it is important to keep in mind that ECR might change that client's perception. ECR can inform the client on the facts, thereby altering the client's perception on whether his position will actually win in court. The result is a willingness to move closer toward a resolution of the issue. Even if the ECR does not result in a settlement of the matter, it might result in narrowing the issues, or getting a better more accurate assessment of the litigation risk.

- b. Section I of the ECR Policy identifies key governance challenges faced by departments/agencies while working to accomplish national environmental protection and management goals. Consider your departments'/agency's ECR case, and indicate if it represents an example of where ECR was or is being used to avoid or minimize the occurrence of the following:

	Check <u>all</u> that apply	Check if	
		Not Applicable	Don't Know
Protracted and costly environmental litigation;	✗	<input type="checkbox"/>	<input type="checkbox"/>
Unnecessarily lengthy project and resource planning processes;	✗	<input type="checkbox"/>	<input type="checkbox"/>
Costly delays in implementing needed environmental protection measures;	✗	<input type="checkbox"/>	<input type="checkbox"/>
Foregone public and private investments when decisions are not timely or are appealed;	<input type="checkbox"/>	✗	<input type="checkbox"/>
Lower quality outcomes and lost opportunities when environmental plans and decisions are not informed by all available information and perspectives; and	<input type="checkbox"/>	✗	<input type="checkbox"/>
Deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts.	✗	<input type="checkbox"/>	<input type="checkbox"/>

9. Please comment on any difficulties you encountered in collecting these data and if and how you overcame them. Please provide suggestions for improving these questions in the future.

In prior years, this report contained information submitted by ELD personnel. This year, the proposed template was provided for input from all Environmental Law Specialists within the Army. Most personnel responded that they utilize outreach programs that provide effective channels of communication with stakeholders and regulators. ECR provisions exist in Federal Facility Agreements and Installation Restoration Program Partnering Programs with EPA and State regulators, but formal provisions have not been invoked. Thus, the Environmental Specialists have had no need for ECR, but would consider it if needed. In the future, I propose to provide the Environmental Law Specialists with additional training regarding the usefulness and cost effectiveness of ECR to assist them in identifying those cases that could benefit from ECR.

Please attach any additional information as warranted.

Report due January 15, 2009.

Submit report electronically to: ECRReports@omb.eop.gov

Attached A. Basic Principles for Agency Engagement in Environmental Conflict Resolution
and Collaborative Problem Solving

**Basic Principles for Agency Engagement in
Environmental Conflict Resolution and Collaborative Problem Solving**

Informed Commitment	Confirm willingness and availability of appropriate agency leadership and staff at all levels to commit to principles of engagement; ensure commitment to participate in good faith with open mindset to new perspectives
Balanced, Voluntary Representation	Ensure balanced inclusion of affected/concerned interests; all parties should be willing and able to participate and select their own representatives
Group Autonomy	Engage with all participants in developing and governing process; including choice of consensus-based decision rules; seek assistance as needed from impartial facilitator/mediator selected by and accountable to all parties
Informed Process	Seek agreement on how to share, test and apply relevant information (scientific, cultural, technical, etc.) among participants; ensure relevant information is accessible and understandable by all participants
Accountability	Participate in the process directly, fully, and in good faith; be accountable to all participants, as well as agency representatives and the public
Openness	Ensure all participants and public are fully informed in a timely manner of the purpose and objectives of process; communicate agency authorities, requirements and constraints; uphold confidentiality rules and agreements as required for particular proceedings
Timeliness	Ensure timely decisions and outcomes
Implementation	Ensure decisions are implementable consistent with federal law and policy; parties should commit to identify roles and responsibilities necessary to implement agreement; parties should agree in advance on the consequences of a party being unable to provide necessary resources or implement agreement; ensure parties will take steps to implement and obtain resources necessary to agreement